Editor's note: 88 I.D. 437

ESDRAS K. HARTLEY

IBLA 80-710 Decided April 9, 1981

Appeal from decision of Arizona State Office, Bureau of Land Management, rejecting oil and gas lease offer A 12541.

Set aside and remanded.

1. Oil and Gas Leases: Lands Subject to--Public Lands: Leases and Permits--Withdrawals and Reservations: Effect of

   Public domain land withdrawn or reserved is presumed to be available for oil and gas leasing unless the withdrawal or reservation specifically provides otherwise.

2. Oil and Gas Leases: Discretion to Lease

   A decision of BLM refusing to issue an oil and gas lease in the exercise of the discretionary authority of the Secretary of the Interior over oil and gas leasing will be affirmed where it sets forth the reasons therefore and the facts of record support the conclusion that refusal to lease is in the public interest.

3. Oil and Gas Leases: Discretion to Lease--Oil and Gas Leases: Stipulations

   Rejection of an oil and gas lease offer is a more severe measure than the most stringent stipulations and the record supporting a decision rejecting a lease offer in the public interest should ordinarily reflect consideration of whether leasing subject to clear and reasonable stipulations would adequately protect the public interest concerns of the surface management agency.

4. Oil and Gas Leases: Consent of Agency--Oil and Gas Leases: Discretion to Lease--Public Lands: Leases and Permits

   Where public domain land is withdrawn or reserved for administration by another agency for a particular purpose, BLM should properly consider the recommendations of the surface management agency regarding lease issuance and any required stipulations, but this does not relieve BLM of the need to make an independent determination supported by the record of whether and under what conditions a lease may issue in the public interest consistent with multiple use values.

APPEARANCES: Laura L. Payne, Esq., Denver, Colorado, for appellant.

OPINION BY ACTING ADMINISTRATIVE JUDGE GRANT

Esdras K. Hartley appeals from a decision of the Arizona State Office, Bureau of Land Management (BLM), dated May 16, 1980, rejecting his noncompetitive oil and gas lease offer, A 12541, for sec. 10, T. 24 S., R. 28 E., Gila and Salt River meridian, Arizona. The land was reserved by Exec. Order No. 2138 of February 19, 1915, for use by

the Arizona National Guard as a rifle range. The BLM decision was based upon a determination by the Adjutant General of the Arizona National Guard that it would not be in the best interest of the National Guard to allow mineral leasing on the rifle range.

Appellant filed his oil and gas lease offer on October 1, 1979, specifying that "[n]otwithstanding anything contained in subject offer to lease, offeror is applying for a subsurface lease only inasmuch as the surface is reserved for military purposes for use of the National Guard of Arizona as a rifle range." On October 24, 1979, BLM issued its first decision rejecting appellant's offer in which it stated:

> The Adjutant General was contacted for input in regard to use of the lands for oil and gas leasing. A response to the request was received and we quote "It is determined by this Headquarters that it would not be in the best interest of the National Guard to allow mineral leasing on the above-mentioned rifle range."

The BLM decision further recited that prior to issuance of leases, the Geological Survey must concur with the stipulations attached to each lease. BLM contended that it is a practice of that agency to deny requests for clearance on stipulations excluding surface occupancy on the entire leasehold. BLM asserted in the decision that such a stipulation would effectively preclude mineral development and therefore the tract should not be leased.

Appellant requested and was granted extensions of time to seek a change in the Adjutant General's recommendation. On May 12, 1980, the

Contract Officer, Office of the Adjutant General, informed appellant that the Division of Military Affairs, State of Arizona, objected to oil and gas leasing of the lands in issue. He explained that the closest range that could be used by units currently utilizing the lands in issue is about 60 miles distant. He noted that such travel would be prohibitive with the fuel allowances provided. On May 16, 1980, BLM rejected appellant's oil and gas lease offer for the reasons stated in the decision of October 24, 1979.

On appeal, appellant asserts that issuance of an oil and gas lease on the subject lands, with appropriate protective stipulations, is not inconsistent with and will not materially interfere with use of the lands for military purposes by the Arizona National Guard as a rifle range. Appellant contends in the statement of reasons for appeal that where the surface of public domain lands is administered by an agency other than BLM, the recommendation of that agency as to oil and gas leasing is advisory in nature and the ultimate decision of whether or not to lease remains with the Secretary.

Appellant acknowledges the proposition that BLM may refuse to issue a lease if the record supports the conclusion that the refusal to lease is required in the public interest. However, appellant contends that there are no facts of record in this case to support the conclusion that leasing is not in the public interest and there is no indication that BLM independently determined that rejection was required.

Appellant further contends that BLM has improperly failed to give any consideration to the possibility of accepting the lease offer subject to reasonable stipulations. Counsel for appellant states that even if BLM determines that no accommodation can be made for surface access by the lessee without interfering with the use of the surface by the National Guard, appellant is willing to accept a lease with a no surface occupancy stipulation.

Accordingly, the issue presented by this appeal is whether a decision of the BLM rejecting an oil and gas lease offer in the exercise of the Secretary's discretionary authority will be affirmed as not being arbitrary, capricious, or an abuse of discretion in the absence of reasons supported by facts of record establishing that refusal to lease is required in the public interest and that clear and reasonable stipulations would not be sufficient to protect the public interest concerns raised by the surface management agency.

[1] Unless a withdrawal or reservation of public domain land specifically provides otherwise, the land withdrawn or reserved is presumed to be available for oil and gas leasing under sections 1 and 17 of the Mineral Leasing Act of 1920, as amended, 30 U.S.C. §§ 181, 226 (1976). Joseph C. Manga, 9 IBLA 319, 320 (1973); see Udall v. Tallman, 380 U.S. 1, 4 (1965).

[2] Section 17 of the Act, 30 U.S.C. § 226 (1976), requires that if an oil and gas lease is issued for lands not within the known

geological structure of a producing oil or gas field, it must go to the first qualified applicant, but "it left the Secretary discretion to refuse to issue any lease at all on a given tract." Udall v. Tallman, supra at 4; Schraier v. Hickel, 419 F.2d 663, 666 (D.C. Cir. 1969). Further, the discretionary authority of the Secretary of the Interior to refuse to issue oil and gas leases for public domain lands applies even where the lands have not been withdrawn from operation of the mineral leasing laws. Udall v. Tallman, supra; Robert P. Kunkel, 41 IBLA 77 (1979). But cf. Mountain States Legal Foundation v. Andrus, 499 F. Supp. 383 (D. Wyo. 1980) (withholding action on substantial numbers of lease offers embracing very large tracts of public domain for extended period may be construed as a withdrawal under section 103 of the Federal Land Policy and Management Act of 1976, 43 U.S.C. § 1702(j) (1976)). A decision of BLM refusing to issue a lease will be upheld provided it sets forth the reasons for doing so and provided the background data and facts of record support the conclusion that the refusal is required in the public interest. Robert P. Kunkel, supra at 78; see Cartridge Syndicate, 25 IBLA 57 (1976). No weight is attached to conclusory declarations of what is required in the public interest where supporting data is not submitted. See James O. Breene, Jr. (On Reconsideration), 42 IBLA 395, 399 (1979).

[3] BLM has the authority to require execution of special stipulations to protect environmental and other land use values when deciding to issue a lease. Rejection of an oil and gas lease offer is a more severe measure than the most stringent stipulations and the record where

leasing has been refused should ordinarily reflect that BLM has considered whether leasing subject to clear and reasonable stipulations would be sufficient to protect the public interest concerns raised by the surface management agency. Robert P. Kunkel, supra at 79; see Howard L. Ross, 49 IBLA 87 (1980); James O. Breene (On Reconsideration), supra.

[4] Where public domain land is withdrawn for administration by another agency for a particular purpose, BLM should properly consider the recommendations of the surface management agency regarding lease issuance and any required stipulations, but this does not relieve BLM of the need to make an independent determination supported by the record of whether and under what conditions a lease may issue in the public interest consistent with multiple use values. See Stanley M. Edwards, 24 IBLA 12, 83 I.D. 33 (1976); Esdras K. Hartley, 23 IBLA 102 (1975). 1/ In a recent case this Board considered an appeal from rejection of an oil and gas lease offer for land withdrawn for use by the Arizona National Guard as a rifle range where rejection was based on a determination of a Guard official that it would not be in the best interest of the National Guard to allow mineral leasing of the land. The Board held that rejection of an oil and gas lease offer for public domain lands withdrawn for the Arizona National Guard for use as a rifle range, based solely on the summary objection of the National Guard, where the record

1/ This should be distinguished from leasing of minerals in acquired lands of the United States under section 3 of the Mineral Leasing Act for Acquired Lands, as amended, 30 U.S.C. § 352 (1976), which requires the consent of the agency having jurisdiction over the lands containing such minerals. See Duncan Miller, 6 IBLA 216, 79 I.D. 416 (1972).

is devoid of any indication that BLM or Guard officials made an independent determination whether leasing is in the public interest, is not a proper exercise of discretion. Howard L. Ross, supra at 88.

This is consistent with the statutory provision cited in Howard L. Ross, supra, to the effect that no disposition of minerals on public lands withdrawn for use by any agency of the Department of Defense shall be made "where the Secretary of Defense, after consultation with the Secretary of the Interior, determines that such disposition or exploration is inconsistent with the military use of the lands so withdrawn or reserved." 43 U.S.C. § 158 (1976). Compatibility of leasing with the military purposes for which the land is withdrawn and whether such military uses might be protected by stipulations are certainly important (and perhaps dispositive) factors in determining whether leasing is in the public interest. However, no decision rejecting a lease offer can be sustained on the mere conclusory assertion that leasing is inconsistent with military use of the withdrawn lands. Accordingly, in the present context we need not reach the issue of whether the Arizona National Guard constitutes an agency of the Department of Defense which must consent to lease issuance under the statutory provision. 43 U.S.C. § 158 (1976). 2/

2/ As a general rule the National Guard is the organized militia of the states and constitutes a state governmental agency. 53 Am. Jur. 2d, Military and Civil Defense § 38 (1970); see Mela v. Callaway, 378 F. Supp. 25 (S.D.N.Y. 1974). Members of the Army National Guard of the United States are not in active Federal service and not part of the regular Army (under the Department of Defense) except when ordered into Federal service under law. 10 U.S.C. §§ 3062(c), 3495 (1976); 53 Am. Jur. 2d, Military and Civil Defense § 15 (1970); see Satcher v. United States, 101 F. Supp. 919 (W.D.S.C. 1952).

BLM rejected the offer in issue on the basis of the conclusory determination of the Adjutant General that it would not be in the best interest of the National Guard to allow mineral leasing on the rifle range. The only reason the National Guard offered for recommending against leasing the land was that it would be an inconvenience and a financial hardship for the Guard to travel to another rifle range 60 miles from the one at issue. The record does not disclose how much of the 640 acres of land is actually used as a rifle range and how frequently the range is used. There is no indication in the record of consideration by either BLM or the National Guard of whether surface use could be restricted to certain portions of the lease in a way which would avoid interference with use of the land by the National Guard.

Finally, BLM has misconstrued this Board's holding regarding issuance of oil and gas leases subject to no surface occupancy stipulations covering the entire lease area. Although as a general rule a stipulation should not be so restrictive as to preclude any right of enjoyment and a lease should not be issued under such circumstances, this Board has recognized an exception where, as in this case, the offeror manifests his willingness to accept a lease embodying those stringent conditions. Cartridge Syndicate, supra at 59.

Accordingly, the case will be remanded to BLM to consult further with the National Guard and to make a determination supported by the record regarding whether lease issuance is incompatible with the military use to which the land is being devoted and whether protective

stipulations may be utilized as a means of eliminating any such incompatibility. The decision on remand should give reasons supported by information of record in the case.

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision of the State Office is set aside and the case is remanded to that office for further consideration consistent with this decision.

C. Randall Grant, Jr.
Acting Administrative Judge

We concur:

Douglas E. Henriques
Administrative Judge

James L. Burski
Administrative Judge